BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN ELLISON Claimant	)	
VS.	)	
GENE'S THRIFTWAY, INC. Respondent	)	Docket No. **1,049,177**
AND	)	
WESTPORT INSURANCE CORP. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 11, 2010 Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

The Administrative Law Judge (ALJ) found:

> Claimant has suffered a repetitive use or cumulative trauma injury to her back. Claimant's back became symptomatic in June, 2009, while Claimant was doing housework at home. Claimant sought her own medical treatment and continued to work.
>
> On or about November 18, 2009, Claimant was asked to sack groceries and be a cashier. As a result of performing these job duties, her back condition became worse.[1]

The ALJ further found claimant gave timely notice on December 21, 2009.

Respondent requests review and argues claimant did not prove she suffered a series of repetitive traumas nor that she provided timely notice of any alleged injuries. Respondent further argues claimant's initial back injury was not work-related as it

[1] ALJ Order (Mar. 11, 2010) at 2.

happened at her home and in all her treatment for that injury she never indicated to the medical providers that it was due to work. Respondent next argues that if it is determined the November 18, 2009 incident occurred, it would be a discrete trauma and claimant admittedly did not provide notice until December 21, 2009. Consequently, timely notice was not provided.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Karen Ellison began working as a bookkeeper/manager for respondent in September 2000. Her job as a bookkeeper required her to make daily deposits, post and handle the accounts receivable which required her to sit five to six hours a day. Her manager duties included supervising the front cashiers and sackers as well as occasionally sacking groceries and running the cash register. Claimant testified she had low back pain in the past and she began experiencing symptoms again in June 2009. She testified:

> How it started was it was the middle week of June and I was getting ready for my daughter to come visit for a week. And during work, I was getting ready to leave one afternoon and my back started being a little sore, and it does that from time to time, nothing major a couple aspirin can't handle, but I had noticed that week it was bothering me. Well, the next day I when I woke up that morning to go to work, it was pretty sore, so I went ahead and called in. And so later on that day I went to make the bed and get ready for my company, and I just bent over a little bit too far or something and I felt a sensation and I thought, "Hm, that's weird," and then after that it just, the pain just started progressing and so I had to call a chiropractor.[2]

Claimant sought medical treatment on her own with Dr. Eric Anderson, a chiropractor. Claimant testified she was on vacation the week of June 22nd and the doctor took her off work the following week. Therapy was recommended and provided three times a week for three months.

On July 3, 2009, claimant was restricted to working every other day, four hours a day. Claimant continued to work three days a week while taking pain medication and attending physical therapy.

Claimant wanted a second opinion so she sought treatment with Dr. Jon Siebert. Dr. Siebert performed three epidural injections to reduce the inflammation in claimant's

[2] P.H. Trans. at 10-11.

lower back. The injections provided some relief and claimant was sent to physical therapy three times a week.

Claimant testified that working three days a week four hours a day she was able to manage well. But she further testified that the Wednesday before Thanksgiving (November 18, 2009) she was required to sack groceries for two hours and worked a total of six hours that day instead of four. As a result she experienced a significant increase in her back pain. She saw Dr. Siebert on November 23, 2009, and his handwritten office note states claimant reinjured her back just bending and lifting but does not indicate such activities were work-related. Dr. Siebert referred claimant to Dr. Douglas Gorecke who saw claimant on December 4, 2009. Dr. Gorecke's office note states that claimant had a return of her lower back discomfort after a heavy schedule at work that included sacking and lifting activities. Claimant received another epidural injection. The injection offered little relief and on December 18, 2009, Dr. Siebert took claimant off work.

Claimant testified:

> Q. Right. But did you ever have a conversation with your employer in which you specifically notified them that you had a back injury as a result of your work activity in June of 2009?
>
> A. No.
>
> Q. Okay. In November of 2009 when your symptoms increased as a result of the extra work, did you notify your employer at that time that you had injured your back at work?
>
> A. Yes.
>
> Q. Okay. Can you explain to me why you didn't tell your employer back in the summer of 2009 that your back symptoms were related to work?
>
> A. I didn't realize at that time that they were related to work.
>
> Q. Okay.
>
> A. I had no clue.
>
> Q. All right. Did you understand at that time that you could make a claim for an injury the type of to your back that you were experiencing at that time?
>
> A. No. And I had -- filing work comp was the furthest thing from my mind because I was still able to work, you know. I hadn't even thought about it. It didn't occur to

> me to file work comp until my second injury until where I got to the point that I couldn't work at all, that's when I realized I had to do something.[3]

On cross-examination, claimant testified that she had presented her health insurance coverage at the medical visits from June 2009 through December 2009.

> Q. The billing records, those are your Exhibit 3, Doctor Goracke?
>
> A. Um-hm. Yes.
>
> Q. He's the one who actually administered the epidurals?
>
> A. Correct.
>
> Q. And you submitted the health insurance claim forms, again, ma'am, that's your Exhibit 3, and he asks, or the health form asks is it employment related and the box is marked no, correct?
>
> A. Correct.
>
> Q. And that's the same on all three of his health claim forms, including December 4 of '09 it's still marked employment, no; do you see that on the form?
>
> A. Um-hm. Yes.
>
> Q. And again that would be even after this alleged November episode where you were lifting the groceries, correct?
>
> A. Correct.
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> Q. And the same on the epidural injections, ma'am, and the treatment with Doctor Siebert. You did that on your own, meaning you did not ask your employer to send you anywhere for treatment?
>
> A. That's correct because I didn't think it was work related at that time.[4]

Claimant testified that the first time she mentioned to her employer that she had been injured on the job was December 21, 2009, when she told her employer about the November 18, 2009 incident and presented her employer with a four week off-work slip. Claimant agreed that she had seen the notice posted in respondent's break room that work injuries should be immediately reported to the employer.

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[3] P.H. Trans. at 23-24.

[4] P.H. Trans. at 34-35.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[5] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[6] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[7]

The evidence compiled to date establishes that although claimant indicated she had some back pain in June 2009, it was a discrete trauma to her back while making a bed at home that led her to seek medical attention. Claimant sought treatment on her own and never indicated that her back condition was work-related, instead she consistently referenced the incident making the bed at home. Claimant never told her employer her condition was work-related. As a result of that injury claimant was placed on a work schedule that limited her work to four hours a day three days a week. And she testified that she managed well with that schedule. Based upon the record compiled to date this Board Member finds claimant's initial injury in June 2009 was not a work-related compensable injury.

As noted, immediately after the June 2009 injury at home, claimant's work schedule was reduced and she was apparently managing well. It was not until the November 18, 2009 incident sacking groceries that she suffered a worsening of her back condition. Dr. Siebert's office note dated November 23, 2009, states claimant reinjured her back just bending and lifting. And Dr. Gorecke's office note dated December 4, 2009, corroborated claimant's testimony that she had a return of her lower back discomfort after a heavy schedule at work that included sacking and lifting activities.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[9]

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[5] K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[6] K.S.A. 2009 Supp. 44-501(a).

[7] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[8] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

In this instance, claimant was being treated for a back injury and then suffered, at a minimum, an aggravation of that condition as a result of her work activities on November 18, 2009. Her version of the work-related incident is corroborated by the contemporaneous medical records. This Board Member finds claimant has met her burden of proof that she suffered a work-related injury.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[10] (Emphasis added.)

Claimant suffered injury as a result of repetitive work activities sacking groceries. As the ALJ noted, under the foregoing statute claimant's date of accident was when she gave the employer written notice of the injury by filing her application for hearing and, consequently, she provided timely notice.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this

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[10] K.S.A. 2009 Supp. 44-508(d).

[11] K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated March 11, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of May 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

[12] K.S.A. 2009 Supp. 44-555c(k).